IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOYOUNG SONG and : CIVIL ACTION

DONG HYAN KIM, :

Plaintiffs, : NO. 06-05589

:

v.

:

EVANGELIA KLAPAKAS,¹ et al., : Defendants. :

MEMORANDUM AND ORDER

Stengel, J. April 12, 2007

On December 22, 2006, plaintiffs Hoyoung Song and her son Dong Hyun Kim filed a writ of mandamus to compel defendants Evangelia Klapakis, Acting Director of Pennsylvania District United States Citizenship and Immigration Services, and Paul Novak, Acting Director of the Vermont Service Center United States Citizenship and Immigration Services, to take action on their application for adjustment of status. On February 15, 2007, defendants moved to dismiss plaintiffs' writ under Rule 12(b)(1) for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted under Rule 12 (b)(6). Plaintiffs have not responded in opposition to the motion, which permits the court to treat this as an uncontested motion under Local Rule of Procedure 7.1(c)² and dismiss the case. However, for the reasons discussed below, the

¹ Plaintiff has mispelled this name. The court will use the correct spelling (Klapakis) in its opinion.

² Under Local Rule 7.1(c), "any party opposing [a] motion shall serve a brief in opposition, together with such answer or other response which may be appropriate, within fourteen (14) days after service of the motion and supporting brief. In the absence of a timely response, the motion may be granted as uncontested," except for Rule 56 motions for summary judgment." E.D. Pa. R. 7.1(c). The Third Circuit has affirmed using this rule to dismiss cases and has "held that it is not an abuse of discretion for a district court to impose a harsh result, such as dismissing a

court will deny the motion and remand to the United States Citizenship and Immigration Services to expeditiously adjudicate plaintiffs' applications.

I. BACKGROUND³

Plaintiff and her son are natives and citizens of Korea. Plaintiff Song was born on October 29, 1970 and entered the United States on September 23, 2000 as a non-immigrant with an employment-based visa. Plaintiff Kim was born on June 27, 1997 and entered the United States on January 24, 2002 as a non-immigrant with an F-2 visa.

Plaintiffs filed an application for adjustment of status (Form I-485) with the Vermont Service Center on May 9, 2005. Plaintiff also submitted an I-140 application to be considered an alien of exceptional ability in the sciences whose presence in the United States promotes the national interest. The Vermont Service Center received the application on May 11, 2005.

On October 13, 2005, the United States Citizenship and Immigration Services ("USCIS") approved plaintiff's I-140 petition. However, USCIS has yet to take action on plaintiffs' adjustment of status application, which they filed nearly two years ago. USCIS has not provided plaintiffs with any information regarding the status of their applications,

motion or an appeal, when a litigant fails to strictly comply with the terms of a local rule." <u>United States v. Eleven Vehicles</u>, 200 F.3d 203, 214 (3d Cir. 2000). District courts have granted uncontested Rule 12(b) motions to dismiss due to a plaintiff's failure to file a timely response under Local Rule 7.1(c). <u>Naeem v. Bensalem Twp.</u>, No. 04-1958, 2005 U.S. Dist. LEXIS 4713, at *4-5 (E.D. Pa. Mar. 24, 2005); <u>Devern v. Graterford State Corr. Inst.</u>, No. 03-6950, 2004 U.S. Dist. LEXIS 9377, at *5 n.4 (E.D. Pa. May 24, 2004); <u>Longendorfer v. Roth</u>, No. 04-0228, 2004 U.S. Dist. LEXIS 8709, at *1 (E.D. Pa. Apr. 30, 2004); <u>Saxton v. Cent. Pa. Teamsters Pension Fund</u>, No. 02-0986, 2003 U.S. Dist. LEXIS 23983, at *84-85 (E.D. Pa. Dec. 9, 2003); <u>Toth v. Bristol Township</u>, 215 F. Supp. 2d 595, 598 (E.D. Pa. 2002).

³ The facts are taken from the writ of mandamus and are accepted as true for the purposes of this motion.

except to say that they are awaiting FBI name checks. Ms. Song's current employment authorization will expire on April 29, 2007. According to defendants' website, they are currently processing similar applications that were filed on February 5, 2006, nine months after the date plaintiffs submitted their applications. Plaintiffs assert that defendants can expedite FBI name checks in certain cases, such as when an alien is about to become ineligible due to age; when an applicant files a writ of mandamus lawsuit; or based on other humanitarian factors.

On December 22, 2006, plaintiffs filed a writ of mandamus requesting that the district court assume jurisdiction; compel the defendants to perform their duty to adjudicate their applications for adjustment of status; and grant other appropriate relief. Defendants have moved to dismiss the suit.

II. STANDARD FOR A MOTION TO DISMISS

A. Rule 12(b)(1) Standard

Since federal courts are courts of limited jurisdiction, a threshold question is whether a court has subject matter jurisdiction over the dispute. When a party brings a motion to dismiss and invokes multiples bases for the motion, a court should consider the Rule 12(b)(1) challenge first because all other defenses will become moot if the court must dismiss the complaint for lack of subject matter jurisdiction. <u>In Re Corestates Fee</u>
<u>Litigation</u>, 837 F. Supp. 104, 105 (E.D. Pa. 1993).

The standard for Rule 12(b)(1) challenges fall into two categories: facial and

factual challenges. Martin v. Kline, 289 F. Supp.2d 597, 599-600 (M.D. Pa. 2003) (citing Mortensen v. First Fed. Sav. & Loan Ass'n., 549 F.2d 884, 891 (3d Cir. 1997)). Facial challenges that allege that the complaint is insufficient to show the federal court has subject matter jurisdiction are evaluated under the same standards as a Rule 12(b)(6) motion. Courtney v. Choplin, 195 F.Supp.2d 649, 650 (D.N.J. 2002).

Factual challenges, which do not challenge the sufficiency of the pleadings but allege that the court lacks subject matter jurisdiction, are not evaluated under this standard. Id. Instead, "[b]ecause at issue in a factual 12(b)(1) motion is the trial court's jurisdiction--its very power to hear the case--there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist." Mortensen, 549 F.2d at 891. As defendants bring a factual challenge, the court will apply this standard to the case.

B. Rule 12(b)(6) Standard

The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is to test the legal sufficiency of a complaint. Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). The court may grant a motion to dismiss only where "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of

his claim that would entitle him to relief." <u>Carino v. Stefan</u>, 376 F.3d 156, 159 (3d Cir. 2004) (quoting <u>Conley v. Gibson</u>, 355 U.S. 41, 45-46 (1957)). The court must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. <u>Id. See also D.P. Enters. v. Bucks County Cmty. Coll.</u>, 725 F.2d 943, 944 (3d Cir. 1984). A plaintiff, however, must plead specific factual allegations. Neither "bald assertions" nor "vague and conclusory allegations" are accepted as true. <u>See Morse v. Lower Merion Sch. Dist.</u>, 132 F.3d 902, 906 (3d Cir. 1997); <u>Sterling v. Southeastern Pa. Transp. Auth.</u>, 897 F. Supp. 893 (E.D. Pa. 1995).

III. DISCUSSION

Plaintiff, in her writ of mandamus, argues that the court has jurisdiction to hear this action pursuant to 28 U.S.C. § 1331⁴ in conjunction with 28 U.S.C. § 1361,⁵ the Administrative Procedure Act ("APA") 5 U.S.C. § 555(b), and the Immigration and Nationality Act ("INA") and its regulations.

A. Jurisdiction Under Mandamus Act

"The common-law writ of mandamus, as codified in 28 U. S. C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." Heckler v.

⁴ Section 1331 confers federal question jurisdiction and states that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

⁵This statue states that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Ringer, 466 U.S. 602, 616 (1984). The duty owed by the government must be "a legal duty which is a specific, plain ministerial act 'devoid of the exercise of judgment or discretion.' An act is ministerial only when its performance is positively commanded and so plainly prescribed as to be free from doubt." Harmon Cove Condo. Asso. v. Marsh, 815 F.2d 949, 951 (3d Cir. 1987) (citing Richardson v. United States, 465 F.2d 844, 849 (3rd Cir. 1972) (en banc), rev. on other grounds, 418 U.S. 166, (1974)).

Defendants argue that adjustment of status is within the discretion of the Attorney General and therefore not susceptible to mandamus jurisdiction. The Immigration and Nationality Act ("INA") permits an Attorney General to adjust an alien's status to a lawful permanent resident if the alien applies for such an adjustment, is eligible for a visa, and if a visa is available to him at the time his application is filed:

The status of an alien who was inspected and admitted or paroled into the United States...may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed. 8 U.S.C. § 1255(a) (emphasis added).

Defendants use the language of the INA to argue that adjustment of status is discretionary.

While there is no Third Circuit precedent on this issue, the majority of federal

These courts have reasoned that even though the actual decision to grant or deny an application for adjustment is discretionary, UCIS has a non-discretionary duty to act on applications within a reasonable time. Haidari v. Frazier, No. 06-3215, 2006 U.S. Dist. LEXIS 89177 (D. Minn. Dec. 8, 2006) (noting that while "the decision of whether to grant or deny an adjustment application is discretionary....Plaintiffs are only asking [the] Court to compel Defendants to make any decision.") (emphasis in original); Paunescu v. INS, 76 F. Supp. 2d 896, 901 (N.D. Ill. 1999) (citing Yu v. Brown, 36 F. Supp. 2d 922, 931 (D.N.M. 1999) (holding that INS "owe[s] Plaintiffs a non-discretionary duty to complete processing of Plaintiffs' [LPR] applications in a reasonable time."). I will follow the majority of district courts who have considered the issue and find that mandamus jurisdiction is appropriate because defendants owe plaintiffs a non-discretionary duty to act on their adjustment of status applications in a reasonable time.

B. Section 1252(a)(2)(B)(ii) Does Not Bar Judicial Review

Defendants also argue that 8 U.S.C. §1252(a)(2)(B)(ii) compels dismissal of plaintiffs' complaint. This section bars judicial review of "any...decision or action of the Attorney General or the Secretary of Homeland Security [under Section 1255(a)] to be in

⁶ In their motion to dismiss, defendants rely on precedent from the Second Circuit, which has consistently declined to exercise mandamus jurisdiction over claims of unduly delayed adjustment of status. See Espin v. Gantner, 381 F. Supp.2d 261, 265 (S.D. N.Y. 2005) (collecting cases from the Second Circuit). However, the weight of authority holds that defendants have a non-discretionary duty to process adjustment applications and that this duty provides a jurisdictional basis for mandamus actions. See Duan v. Zamberry, No. 06-1351, 2007 U.S. Dist. LEXIS 12697, at *11 (W.D. Pa. Feb. 23, 2007) (collecting cases from district courts in Minnesota, California, Florida, New Mexico, and North Dakota).

the discretion of the Attorney General or the Secretary of Homeland Security."

Defendants use this section to argue that plaintiffs seek review of USCIS's "decision" or "continuing action" of not adjudicating their adjustment petitions. Another court has pointed out the fallacy of this argument: "[w]ere plaintiffs contending that they had been denied relief, this court likely would not have jurisdiction over their claims. Because plaintiffs have neither been denied nor granted relief, [this section] does not bar jurisdiction....[D]efendants simply failed to do anything at all. This was not a 'decision,' let alone a discretionary call. Plaintiffs do not ask this court to 'review' a governmental action, but to examine and rectify a gross inaction." Paunescu, 76 F. Supp. 2d at 900 (internal citations omitted). I find that Section §1252(a)(2)(B)(ii) does not bar judicial review because USCIS has not made a decision or acted on plaintiffs' applications.

C. Jurisdiction Under the Administrative Procedures Act

Alternatively, plaintiffs base jurisdiction under the Administrative Procedures Act ("APA"), which governs judicial review of agency decisions. The APA states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. "Agency action" includes the failure to act. 5 U.S.C. § 551(13). The APA also requires that "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). The reviewing

court has the power to "compel agency action unlawfully withheld or unreasonably delayed". 5 U.S.C. § 706(1).

Defendants contend that the APA is not a proper basis for jurisdiction because the statutes does not apply to discretionary agency decisions, such as adjustment of status.

See id. at 702(2) (noting that the APA does not apply where "agency action is committed to agency discretion by law."). Other courts that have considered this issue have found that APA does not bar jurisdiction because while the agency has discretion to determine the outcome of an adjustment application, they do not have discretion concerning the timing of processing applications. Duan, 2007 U.S. Dist. LEXIS 12697 at *12. Further, when a plaintiff alleges that USCIS has unreasonably delayed, jurisdiction is proper because "USCIS simply does not possess unfettered discretion to relegate aliens to a state of limbo, leaving them to languish there indefinitely. This result is explicitly foreclosed by the APA." Haidari, 2006 U.S. Dist. LEXIS 89177 at *17 (citing Kim, 340 F. Supp. at 393). Therefore, jurisdiction is appropriate under the APA.

D. Rule 12(b)(6) Motion

Dismissal of plaintiffs claims are also improper under Rule 12(b)(6) because accepting plaintiffs' allegations as true, USCIS has violated the APA by unreasonably delaying adjudication of plaintiffs' adjustment of status applications filed nearly two years ago. Therefore, the court must deny defendants' motion to dismiss under Rule 12(b)(6).

E. Remand to USCIS

Alternatively, defendants ask the court to remand to USCIS to adjudicate plaintiffs adjustment of status applications. This is the most appropriate resolution of the case because only defendants have the specialized knowledge to adjudicate plaintiffs applications. This method has been utilized by other courts. See Haidari, 2006 U.S. Dist. LEXIS 89177 (denying motion to dismiss and remanding to USCIS to complete processing of plaintiffs adjustment of status applications within 30 days).

IV. CONCLUSION

For the reasons discussed above, I will deny defendants' motion to dismiss and remand to USCIS to complete adjudication of plaintiffs applications within thirty days. An appropriate order follows.

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Defendants. :

ORDER

AND NOW, this 12th day of April, 2007, upon consideration of Defendants' Motion to Dismiss (Document No. 3), it is hereby **ORDERED** that the motion is **DENIED.** USCIS is **ORDERED** to complete its adjudication of plaintiffs' I-485 applications within 30 days. Upon completion, USCIS shall promptly inform the court and the plaintiffs of its decisions. The court will retain jurisdiction over the matter during this interim time period to ensure that USCIS complies with the order.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.